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JOHN M. PELKEY
ADMITTED IN D.C. AND VA

May 1, 1996

OUR FILE NO.
1162-101-63

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-158
Reply to Opposition to Application for Review

Dear Mr. Caton:

On behalf of Donald B. Brady, an interested party in the above-referenced proceeding, please find enclosed an original and six copies of Mr. Brady's Reply to Opposition to Application for Review.

Should you have any questions concerning this matter, please contact the undersigned directly.

Sincerely,

John M. Pelkey

JMP/ned
Enclosures: (7)

Before The

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 93-158
Table of Allotments	)	RM No. 8239
FM Broadcast Stations	)	
	)	
Hazlehurst, Utica and Vicksburg, Mississippi		

To: The Commission

Reply to Opposition to Application for Review

Donald B. Brady ("Brady"), through counsel, hereby replies to the Opposition to Application for Review submitted by Willis Broadcasting Corporation ("Willis"). For the reasons set forth in the Application for Review, the Commission must review the staff action in the above-referenced proceeding inasmuch as the staff's decision deprives Brady of an opportunity for a Class C3 allotment at Utica, Mississippi.

Background

On June 16, 1993, the Commission staff issued a *Notice of Proposed Rulemaking and Order to Show Cause* ("Notice")[1] wherein it

[1] 8 FCC Rcd 4080 (1993).

proposed to substitute Channel 265C3 for Channel 225A at Utica, Mississippi. The Notice specified that, if "another party indicate[s] an interest in the C3 allotment at Utica, the modification cannot be implemented unless an equivalent class channel is also allotted".[2] Brady, acting *pro se*, submitted an expression of interest to the Commission. The expression of interest was in the form of a letter of four sentences that was twice faxed to the Commission and sent to the Commission via a messenger service.

The proponent of the rulemaking[3] did not seek reconsideration of the staff's ruling that, if another party indicated an interest in the C3 allotment at Utica, the proposed modification could not be implemented unless an equivalent class channel were also allotted. Nevertheless, the staff ruled that, despite Brady's expression of interest, no equivalent class channel was to be allotted in addition to the proposed modification. Instead, the staff merely allotted Channel 265 to Utica, albeit as a Class C2 facility rather than the originally requested Class C3, and modified the license of Station WJXN(FM) to specify operation on Channel 265C2.[4]

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[2] 8 FCC Rcd at 4080.

[3] The petition for rulemaking was filed by Saint Pe' Broadcasting, then licensee of WJXN(FM), Utica, MS. WJXN(FM) was subsequently sold to Willis, which assumed Saint Pe's interest in this proceeding. For the sake of convenience, the proponent's proposal will be referred to herein as the "Willis proposal".

[4] See *Report and Order*, 9 FCC Rcd 6439 (1994).

The staff refused to consider Brady's expression of interest because, in the staff's view, the expression of interest was not timely filed. More fundamentally, the staff refused to consider Brady's expression of interest because the staff belatedly viewed the allocation of Channel 265 to Utica as an "incompatible channel swap."

On reconsideration the staff acknowledged that it was error not to have considered Brady's expression of interest as timely.[5] Nevertheless, the staff reaffirmed its earlier decision that the allocation of Channel 365 to Utica created an "incompatible channel swap."

Argument

In his application for review, Brady explained to the Commission that review of the staff decision is required inasmuch as the staff decision failed to properly acknowledge that its determination that the submission of expressions of interest required either the denial of the requested modification or the allotment of an equivalent class channel was a final order for which reconsideration had not been timely sought. In addition, the application for review explained that the staff's determination that the proposed allocation at Utica created an incompatible channel swap was incorrect in that it failed to take into

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[5] *Memorandum Opinion and Order*, MM Docket No. 93-158, (Adopted: February 8, 1996; Released: February 22, 1996).

account channels that could be used at locations other than the existing station's transmitter site. In response, Willis argues that (1) Brady's contention that he was denied participation rights is moot; and (2) the staff's analysis of the "incompatible channel swap" policy was correct. Neither of Willis' positions is well taken.

I. Brady has Been Irreparably Injured by the Staff's Refusal to Recognize His Participation Rights.

Willis argues that Brady was not deprived of his rights of participation inasmuch as the staff considered Brady's arguments in the MO&O issued on reconsideration. This claim is both highhanded and glib. Essentially, the staff ultimately considered Brady's expression of interest only for the purpose of informing Brady that he had no right to file an expression of interest. This is hardly the type of participation to which Brady was entitled. The staff clearly informed the public at large that members of the public would be free to file expressions of interest for a new channel at Utica and that, if such expressions were filed, either an additional allotment would be made at Utica or, if no such allotment was available, the Willis proposal would be denied. This is not what happened, however.

Instead, after the staff's decision had become a final order, and without a timely-filed petition for reconsideration having been filed, the

staff reversed itself and determined that it would not accept expressions of interest. Brady was entitled to have an additional channel allocated at Utica. If no such channel was available, the Willis proposal was to be denied. Neither of these things happened and, as a result, Brady, despite Willis' contentions to the contrary, was denied the relief to which the staff itself initially found that parties filing expressions of interest would be entitled. As a result, the Commission has no choice but to reverse the staff and to deny the Willis proposal.

II. The Staff has Extended the "Incompatible Channel Swap" Doctrine in a Fashion that is Contrary to Precedent and Without Authority

In its application for review, Willis basically argues that the Commission staff should not force a station to change its transmitter location. This argument, however, looks at the problem from the wrong end of the telescope.

Section 1.420(g)(3) of the Commission's rules has an unfortunately preclusive effect on the participation of otherwise interested parties in Commission allocation proceedings. Whenever a station seeks to upgrade its facilities, that upgrade necessarily has the effect of foreclosing the use of some portion of the spectrum by other parties. The question that is always raised by such an upgrade is, "Why

should the incumbent automatically be afforded the benefit of the upgrade?". Take for example, the situation where a Class A station seeks to upgrade to full Class C status but, in order to do so, must move to a frequency ten channels away. There is no reason why the Class A station should be permitted to effectuate such an increase without being subjected to the risk of competing applications merely because it is already a Commission licensee.

Recognizing the fundamental unfairness of such a situation, the Commission has narrowly limited those circumstances under which a licensee would be permitted to upgrade its facilities without subjecting itself to the risk of competing applications being filed. Thus, Section 1.420(g) permits the Commission to modify the license of an FM station to specify operation on another class of channel only if (1) there is no other timely filed expression of interest, or (2) if a timely expression of interest is filed, an additional equivalent class of channel is also allotted, or (3) the modification of the license would occur on a mutually exclusive adjacent or co-channel frequency.

The incompatible channel swap theory has the effect of extending the preclusionary effect of Section 1.420(g)(3). As a result, it necessarily must be narrowly defined if it is not to have the effect of providing incumbent licensees with the ability to forestall other members

of the public from proposing allocations or operations that would be mutually exclusive with the proposal being made by the upgrade proponent. Thus, the purpose of the "incompatible channel swap" doctrine is not to force third parties to move their transmitter sites, but to ensure that upgrade proponents do not receive an unwarranted free ride safe from the possibility of their proposals being subjected to competing applications. Because the purpose of the "incompatible channel swap" doctrine is to create a narrow exception to the general requirement that a station is entitled to an upgrade only on its current frequency or its adjacent frequencies, the doctrine must be read narrowly. In the present case, however, the staff so enlarged the exception that the exception now swallows the rule.

Conclusion

The facts in this case are straightforward. Brady filed an expression of interest for the Utica, Mississippi allocation. As a result, the proposed Willis allocation could not be made unless an additional allocation of the same class was made to Utica so that other interested parties, such as Brady, could file an application for this additional

allocation. This the Commission staff refused to do and, as a result, the staff's action must be reversed.[6]

Respectfully submitted,

Donald B. Brady

By: _____
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Its Attorney

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[6] In its Opposition to Application for Review, Willis again claims that Brady did not agree to reimburse the Hazlehurst station that would be required to change frequency to accommodate Willis' proposal. As an initial matter, it must be pointed out that the frequency for which Brady would be entitled to apply would be a separate frequency not dependent upon a change of frequency by the Hazlehurst station. Thus, a question arises as to whether any commitment to reimburse was required. In any event, Mr. Brady did commit to reimburse the Hazlehurst station. See *Contingent Motion for Leave* at n.1. (filed October 12, 1993).

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley Bader & Potts P.L.C., hereby certifies that the foregoing document entitled "Reply to Opposition to Application for Review" was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered, to the following:

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Date: May 1, 1996

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